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Supreme Court, U.S.
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In The

Supreme Court of the United States

LEE O. WILSON, JR., PETITIONER,

v.

GENE M. JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1915(e)(1) of Title 28 authorizes district courts to appoint counsel in a civil case for parties who cannot afford counsel. All thirteen courts of appeals have addressed whether the denial of the appointment of counsel is an immediately appealable order. Nine courts of appeals have held that they are without jurisdiction to immediately review such orders; three have held that they possess jurisdiction to immediately review such orders; and one court of appeals has held that appellate jurisdiction depends upon the type of claim presented. The question presented is:

Whether the denial of the appointment of counsel in a civil case is an order that is immediately appealable.

PARTIES TO THE PROCEEDING

Petitioner is Lee O. Wilson, Jr.

Respondents are Gene M. Johnson, Director, Virginia Department of Corrections; Doris Ewing, Supervisor, Court and Legal Services; Edward Meeks, Superintendant, Cold Springs Work Center.

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PETITION FOR A WRIT OF CERTIORARI

Lee O. Wilson, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The order of the district court denying the appointment of counsel (App., *infra*, 3a-5a) is unreported.

JURISDICTION

On June 29, 2009, the United States District Court for the Eastern District of Virginia denied petitioner's request for appointed counsel. App., *infra*, 3a-5a. On appeal, the Fourth Circuit dismissed the case, holding that it lacked appellate jurisdiction. App., *infra*, 2a. The court of appeals entered its judgment on November 24, 2009. On February 16, 2010, Chief Justice Roberts granted an extension of time within which to file a petition for a writ of certiorari to and including March 24, 2010.

For the reasons explained below, the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and exists whether or not the court of appeals had appellate jurisdiction. *See Nixon v. Fitzgerald*, 457 U.S. 731, 741-743 & n.23 (1982).

STATUTORY PROVISIONS INVOLVED

Section 1915 of Title 28 of the United States Code provides in relevant part:

> (e)(1) The court may request an attorney to represent any person unable to afford counsel.

Section 1291 of Title 28 of the United States Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

This case presents the question whether a pro se party who cannot afford counsel, and who is denied appointed counsel by a district court, can appeal immediately, or whether (as the court below held) he must go through the entire district court case without an attorney—with only the prospect of appellate review of the denial of counsel after final judgment is entered. In the meantime, under the approach of the

court below, he must hope that his unfamiliarity with law and procedure do not irrevocably prejudice the merits of the case, such that any subsequent appellate review of the denial of counsel lacks meaning. All thirteen courts of appeals have addressed the question whether the denial of the appointment of counsel is an immediately appealable order. Nine courts of appeals, including the court below, have held that they are without jurisdiction to immediately review such orders; three have held that they possess jurisdiction to immediately review such orders; and the Ninth Circuit has held that it depends upon the type of claim presented.

If petitioner's case fell within the jurisdiction of the Fifth, Eighth, or Federal Circuits, he would have had a right to immediately appeal the denial of his request for appointed counsel. But because his case is pending within the Fourth Circuit, he must proceed alone to final judgment on the merits of his case, without the benefit of counsel, before he can challenge the denial of his request.

This divergent treatment in the courts of appeals will not be resolved without this Court's intervention, and this petition presents the Court with an opportunity to address an issue that has long evaded review.

STATEMENT OF THE CASE

A. Statutory Framework

1. Congress has given district courts the authority to appoint counsel in civil lawsuits when a person is unable to afford an attorney, as well as in a swath of civil rights lawsuits. *See, e.g.*, 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."); 42 U.S.C. §§ 2000a-3(a) ("the court may appoint an attorney" for a complainant seeking an injunction under the civil rights laws); 2000e-5(f)(1)(B) ("the court may appoint an attorney" for a Title VII complainant). In enacting these provisions, Congress understood that lawsuits often involve parties of "unequal strength and resources" in which one party "has at his disposal a vast array of resources and legal talent." H.R. Rep. No. 92-238, at 12 (1971). By authorizing the appointment of counsel in such circumstances, Congress created a means for the court to place the parties on more equal footing in the appropriate case.

2. Title 28 U.S.C. § 1291 grants jurisdiction to the courts of appeals over "all final decisions of the district courts." This statute has been interpreted to provide that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

For more than a half-century, however, this Court has recognized that a "practical construction" of the

final judgment rule permits immediate appellate review over a "small class" of orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978). To fit within this class, an "order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

B. Factual Background And Proceedings Below

1. Petitioner, an individual proceeding pro se, filed an action in the United States District Court for the Eastern District of Virginia seeking damages against certain state officials under 42 U.S.C. § 1983. Petitioner alleged that respondents unconstitutionally caused him to spend an extra five months in prison based on their misreading of his state court sentencing order, which was the result of a plea bargain. At the time petitioner filed this suit, he already had served the entirety of that prison sentence (including what he alleged to be the unwarranted five months), although he had returned to prison for a separate offense. App., *infra*, 8a-9a & n.2.

On February 27, 2007, seven days after the complaint was filed and before any additional filings were made in the case, the district court sua sponte

dismissed the case. The court held that petitioner could not maintain a Section 1983 damages claim until after he successfully challenged his confinement in a habeas petition under 28 U.S.C. § 2254. Petitioner appealed.

2. On appeal, and after informal briefs were filed, the Fourth Circuit appointed counsel to represent petitioner for the purposes of the appeal. App., *infra*, 3a-4a.

In a published opinion, the court of appeals reversed and remanded to the district court. The court of appeals held that petitioner's Section 1983 claim for unconstitutional imprisonment was the appropriate means to seek relief. App., *infra*, 18a-20a. Because petitioner's sentence had expired, the court of appeals recognized that a Section 1983 claim was petitioner's only avenue to relief and explained that it did "not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court." App., *infra*, 19a.

Respondents sought rehearing en banc, which the court of appeals denied. Respondents did not seek review from this Court.

3. On remand, petitioner again proceeded pro se, because the Fourth Circuit's appointment of appellate counsel did not extend to the district court.

On December 1, 2008, petitioner filed a motion requesting to proceed in forma pauperis and, on

February 23, 2009, petitioner filed a motion requesting the appointment of counsel. App., *infra*, 3a. On April 23, 2009, the district court granted petitioner's motion to proceed in forma pauperis, but did not act on his request for the appointment of counsel. Petitioner renewed his motion for the appointment of counsel on June 19, 2009.

On June 23, 2009, respondents filed an answer to the complaint in which they asserted fourteen defenses, and filed a motion for summary judgment supported by a 17-page legal memorandum and a number of exhibits. Three days later, petitioner opposed the motion for summary judgment pro se.

On June 29, 2009, the district court denied petitioner's original and renewed motions for appointment of counsel. App., *infra*, 3a-5a. The court recognized that pursuant to 28 U.S.C. § 1915(e)(1), a "court may request an attorney to represent an indigent plaintiff proceeding *in forma pauperis*." App., *infra*, 3a-4a. The court nevertheless found that the appointment of counsel was limited to cases where "exceptional circumstances" exist, and found that petitioner had made no showing that exceptional circumstances existed to warrant the appointment of counsel. App., *infra*, 4a. Notwithstanding the appointment of counsel in the court of appeals and the reversal in a published opinion of the district court's prior sua sponte dismissal of the case, the district court explained that the appointment of counsel was unnecessary because petitioner "ably filed his pleadings and replied to the various orders, as well as

demonstrated comprehension of the procedures and laws of this Court." App., *infra*, 4a.

4. Petitioner appealed the denial of appointment of counsel, but the court of appeals dismissed the appeal. Consistent with its past holdings, the Fourth Circuit held that it lacked appellate jurisdiction over the appeal because an order denying appointment of counsel "is neither a final order nor an appealable interlocutory or collateral order." App., *infra*, 2a.

The district court has not yet ruled on the merits of petitioner's case.

REASONS FOR GRANTING THE PETITION

THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE IMPORTANT ISSUE OF WHETHER THE DENIAL OF APPOINTMENT OF COUNSEL IN A CIVIL CASE IS AN IMMEDIATELY APPEALABLE ORDER

This is the rare instance in which the question presented has been addressed by *every* federal court of appeals, those courts are divided, and there is no indication that the courts of appeals will come to a single result absent this Court's intervention. On that basis alone, certiorari should be granted. But the question in this case also is a significant one—one that members of this Court have in the past urged the Court to address and that the leading treatise on federal practice and procedure has explained is in need of resolution by this Court. The issue is important to the nation's system of justice, as it touches

upon the core question of when a party who cannot afford an attorney should be appointed one by the court. The denial of counsel unquestionably affects every subsequent litigation decision in a case. After final judgment, it is virtually impossible to distinguish on review between missteps caused by the lack of counsel and any inherent weaknesses in the merits of a case. And, because this issue involves pro se litigants navigating trial and appellate courts, this is an issue that evades review by this Court. This petition likely presents one of the few opportunities this Court will have to address the question presented.

A. This Case Squarely Implicates A Circuit Conflict Involving Every Court Of Appeals That Will Not Be Resolved Absent This Court's Intervention

1. Three courts of appeals permit immediate appeals of orders denying the appointment of counsel

In conflict with the ruling below, the Fifth, Eighth, and Federal Circuits all have held for more than 20 years that a party denied the appointment of counsel in a civil case can immediately appeal that order. *See Lariscey v. United States*, 861 F.2d 1267, 1270 (Fed. Cir. 1988); *Robbins v. Maggio*, 750 F.2d 405, 407 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984).

Unlike the Fourth Circuit rule governing this case, the Fifth Circuit has held that the denial of an

appointment of counsel is an immediately appealable order under the collateral order doctrine. *Robbins*, 750 F.2d at 407. The court explained that a denial of appointment of counsel "conclusively determine[s]" whether a defendant must litigate "without the assistance of appointed counsel." *Id.* at 412. The denial also is collateral to the case, because "[t]he factors examined in reviewing an order denying appointment of counsel" are different from those governing the merits of a case. *Ibid.* And the court of appeals concluded that the denial of the appointment of counsel is effectively unreviewable because there is a "great risk" that a civil rights plaintiff denied counsel "may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case." *Ibid.*; *see also Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (explaining that "a layman unschooled in the law in an area as complicated as the civil rights field * * * likely has little hope of successfully prosecuting his case to a final resolution on the merits").

The Eighth Circuit also has had "little hesitation in concluding that" an order denying appointment of counsel is immediately appealable. The court of appeals explained that an order denying appointment "conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and [would] be effectively unreviewable on appeal from a final judgment." *Slaughter*, 731 F.2d at 588 (quoting *Coopers &*

Lybrand, 437 U.S. at 468); *see also Hudak v. Curators of Univ. of Mo.*, 586 F.2d 105, 106 (8th Cir. 1978) ("We have held that denial of appointment of counsel is appealable under 28 U.S.C. § 1291 as a final collateral order on the basis that the harm it may cause can be irreparable on appeal of the final judgment."), cert. denied, 440 U.S. 985 (1979).

Like the Fifth and Eighth Circuits, the Federal Circuit has held "that denial of the request for appointment of counsel [in a civil case] is immediately reviewable on appeal." *Lariscey*, 861 F.2d at 1270. In so concluding, the Federal Circuit recognized the existence of "a split among the regional circuits" on the issue. *Id.* at 1269. The court explained that a district court's denial of the appointment of counsel conclusively determines an issue that is entirely distinct from the merits of the underlying case—i.e., that it is not "necessary to resolve any issues on the [case's] merits in order to consider the question of appointment of counsel." *Id.* at 1270. And the court of appeals explained that the appointment of counsel issue was effectively unreviewable because "it is far from clear that once the merits had been decided, the absence of counsel would so readily be held harmful." *Ibid.* The court reasoned that if the case appeared on appeal "to have been reasonably presented, the appellate court may never know whether a different or better case could have been presented that would have turned the tide in the indigent litigant's favor." *Ibid.*

These courts of appeals, in conflict with the ruling below, continue to adhere to their precedent permitting immediate appellate review of an order denying the appointment of counsel. *See, e.g.*, *Sanchez v. Chapman*, No. 08-11082, 2009 WL 3731891, at *2 (5th Cir. Nov. 9, 2009); *Swackhamer v. Scott*, 276 Fed. App'x 544, 545 (8th Cir. 2008); *Medrano v. Thomas*, 99 Fed. App'x 521, 522 (5th Cir. 2004). And on a number of occasions, those courts have concluded that the denial by the district court of the appointment of counsel was in error. *See, e.g.*, *Medrano*, 99 Fed. App'x at 522; *Sanchez*, 2009 WL 3731891 at *2; *Lane v. Astrue*, 279 Fed. App'x 421, 422 (8th Cir. 2008) (per curiam).

2. ***Nine courts of appeals have held there is no appellate jurisdiction to immediately review the denial of the appointment of counsel, although they disagree on the rationale***

On the other side of this rift in the courts of appeals, the Fourth Circuit below is joined by the First, Second, Third, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, all of which have held that the denial of appointment of counsel is not an immediately appealable order. *See Ficken v. Alvarez*, 146 F.3d 978, 981-982 (D.C. Cir. 1998); *Holt v. Ford*, 862 F.2d 850, 852-854 (11th Cir. 1989) (en banc); *Miller v. Simmons*, 814 F.2d 962, 965-967 (4th Cir.), cert. denied, 484 U.S. 903 (1987); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 761-762 (6th Cir.) (en banc), cert. denied, 474 U.S. 1036 (1985); *Smith-Bey*

v. Petsock, 741 F.2d 22, 24-26 (3d Cir. 1984); *Appleby v. Meachum*, 696 F.2d 145, 146 (1st Cir. 1983); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981); *Miller v. Pleasure*, 425 F.2d 1205, 1206 (2d Cir.) (per curiam), cert. denied, 400 U.S. 880 (1970). While these courts agree as to the result, they are significantly divided as to the reasoning for it.

a. Several courts of appeals have held that an order denying the appointment of counsel, while conclusively determining a collateral issue in the proceeding, is nevertheless not an appealable order because it would be reviewable on final judgment. The Tenth Circuit, for example, has held that such an order is reviewable at the end of the case because it "can be fully remedied by a post-judgment reversal and a new trial." *Cotner*, 657 F.2d at 1392. The First and Seventh Circuits also have adopted this rationale in denying immediate appellate review of appointment of counsel orders. *See Appleby*, 696 F.2d at 146 (First Circuit); *Randle*, 664 F.2d at 1066 (Seventh Circuit).

b. In contrast, the Fourth, Sixth, and Eleventh Circuits have adopted a different basis for holding that the denial of the appointment of counsel is not an appealable collateral order. These courts have all ruled that such an order fails to satisfy *any* of the requirements under the collateral order doctrine.

When establishing the governing rule applicable to this case, the Fourth Circuit held that the denial of

the appointment of counsel is not a conclusive ruling because "the district court can reconsider, at a later time, in the exercise of its discretionary authority, the appointment of counsel as a viable option, if in fact such is determined to be necessary." *Miller*, 814 F.2d at 966. Moreover, the court of appeals reasoned that the issue was not collateral to the merits of the case because the "ultimate effect" of the denial of the appointment of counsel "cannot be fairly and adequately assessed until the substance of the entire case is known" and a plaintiff can subsequently show "that the absence of appointed counsel was so prejudicial that the denial amounted to a denial of fundamental fairness." *Ibid.* The court further concluded that the denial of the appointment of counsel is not effectively unreviewable in a final judgment because "[e]xperience teaches that a *pro se* litigant will raise on appeal each and every issue resulting from an unfavorable ruling" and, if prejudicial error is shown, the "judgment can be vacated and remedial measures can be ordered." *Id.* at 967.

Divided en banc rulings from the Sixth and Eleventh Circuits are in accord with the Fourth Circuit's reasoning. In both cases, those courts of appeals concluded that an order denying the appointment of counsel does not meet any of the requirements of the collateral order doctrine. *See Henry*, 763 F.2d at 761-762 (Sixth Circuit); *Holt*, 862 F.2d at 852 (Eleventh Circuit). Four judges in each of these circuits, however, dissented from their respective court's rulings.

In the Sixth Circuit, the dissent explained that the majority's reasoning was based upon an "unsupported conclusory hypothesis that dispositions of motions to appoint counsel are 'inherently tentative' since trial judges may reconsider their ruling as the *pro se* complainant develops the evidence during trial." *Henry*, 763 F.2d at 765 (Krupansky, J., dissenting). According to the dissent, the issue was collateral to the merits of the case because it involved only "a minimal and incidental inquiry by the Court which in no way enmeshes it in the underlying cause of action itself." *Id.* at 767. Finally, the dissent explained that the majority had unnecessarily "equate[d]" the requirement that the collateral order be effectively unreviewable with it being "jurisdictionall[ly] unreviewable." *Id.* at 768.

Likewise, the dissent for four judges in the Eleventh Circuit explained that the denial of a motion for the appointment of counsel was conclusive because the district court "*denied* the motion" and "did not indicate that its order was tentative." *Holt*, 862 F.2d at 856 (Vance, J., dissenting). And the issue was collateral to the merits of the case because "[s]uch rulings merely require courts to determine whether the underlying claim has *some* merit." *Id.* at 857. Finally, the dissent explained that the majority lost sight of the fact that the inquiry "is not whether a claim becomes jurisdictionally unreviewable, but whether it becomes *effectively* unreviewable." *Ibid.* The dissent explained that after a final judgment "where a district court has denied a civil rights

plaintiff appointed counsel, the record on appeal probably will not be sufficient to reveal what the plaintiff could have proved if counsel had been appointed." *Id.* at 858.

c. Finally, three other courts of appeals have each emphasized different bases for determining that there is no appellate jurisdiction to review a district court's order denying the appointment of counsel. The Second Circuit has held that such a "determination whether the district judge abused his discretion requires considerable exploration of the merits" of the case. *Pleasure*, 425 F.2d at 1206. A divided Third Circuit has held that the denial of the appointment of counsel is not immediately appealable because it required examination of "issues 'enmeshed' in the plaintiff's cause of action" and was reviewable at the end of the case. *Smith-Bey*, 741 F.2d at 24-26. And the D.C. Circuit, which ironically appointed amicus counsel to argue the appeal along with the pro se litigant, recognized this division in the circuits. In finding a lack of appellate jurisdiction for an immediate appeal, it reasoned that the denial of counsel does not conclusively determine the issue because the district court can always reconsider its prior ruling and did not "render impossible any review whatsoever." *Ficken*, 146 F.3d at 982 (quoting *Firestone*, 449 U.S. at 376).

3. The Ninth Circuit has held that its appellate jurisdiction depends upon the claim being raised

In conflict with every other circuit to consider the issue, the Ninth Circuit has staked out its own ground, holding that the appealability of a denial of appointment of counsel depends upon the claim being raised.

In *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981), the court of appeals held that "orders denying appointment of counsel in Title VII suits are [immediately] appealable under Section 1291." *Id.* at 1305. But the Ninth Circuit has held that the denial of appointment of counsel is not immediately appealable in a habeas proceeding, *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983), or in a proceeding brought under Section 1983, *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (concluding that such orders require a court to enmesh itself in the merits of the case). In explaining its divergent treatment of such cases, the court noted that in Title VII suits, unlike those brought under Section 1983, "Congress has made explicit findings that Title VII litigants are presumptively incapable of handling properly the complexities involved in Title VII cases." *Wilborn*, 789 F.2d at 1330 n.2.

B. Review Is Necessary Because The Question Whether Counsel Should Be Appointed Is A Crucial Threshhold Issue That, When Incorrectly Determined And Left Unreviewed, Adversely Affects All Subsequent Litigation Decisions

Although the division in the courts of appeals alone justifies this Court's review, certiorari should be granted because the question presented is exceptionally important. Whether a pro se party who cannot afford a lawyer, but is erroneously denied one, can seek immediate appellate relief could be case dispositive. Under the approach of the court below, and eight other courts of appeals, such a party must go through the entire district court proceeding without counsel, with only the hope that his unfamiliarity with law and procedure does not irreparably prejudice the merits of his case, such that any eventual review of the denial of counsel is effectively meaningless.

The importance of ensuring that a party entitled under the law to counsel receives one at the earliest opportunity should be beyond dispute. This Court has recognized that a pro se litigant is at a severe, and at many times almost insurmountable, disadvantage in civil litigation against a counseled adversary. *See Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964) ("Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries * * * ."). Counsel are needed to execute basic advocacy

functions: to delineate the issue, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. Pro se litigants normally cannot adequately perform any of these tasks. *See* Am. Bar Ass'n, *Report to the House of Delegates* 9 (2006) (noting that counsel is required to navigate the "inevitably adversarial and complex" nature of our judicial system), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf (last visited Mar. 19, 2010).

Indeed, the entire adversary process can be distorted by the failure to appoint counsel in the proper case. The pro se litigant may accidentally or deliberately drop a claim, fail to prosecute the case from ignorance or inability, inadvertently disclose previously privileged material, settle on disadvantageous terms, or fail on a technicality to perfect an appeal. *See Bradshaw*, 662 F.2d at 1310-1311 (detailing harms that a pro se litigant may suffer without immediate review of an order denying appointment of counsel); 15B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3914.21, at 106-107 & 112 n.47 (2d ed. 1992) (same). In short, "it is not realistic to expect that effective relief can be given on appeal from the final judgment." Wright & Miller, *supra*, at 106. The decision whether to appoint counsel can thus be viewed as virtually outcome determinative in many cases: empirical studies show that legal representation is an important factor in whether a party wins a case. *See*,

e.g., Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 553-554 (1992).

This Court has granted interlocutory review for a myriad of important rights like those implicated in this case. *See, e.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (order denying State's claim to Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 659 (1977) (order rejecting double jeopardy claim); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (order denying motion to reduce bail); *Roberts v. United States Dist. Court for the N. Dist. of Cal.*, 339 U.S. 844, 845 (1950) (order denying in forma pauperis status). Whether a pro se litigant is entitled to immediate appellate review of the denial of counsel is a similarly significant issue, which at the very least is too important to be subject to the divergent treatment in the courts of appeals that now exists.

C. This Case Presents An Ideal Opportunity To Address An Issue That Typically Evades Review

Although the question presented has long divided the circuits, the question is neither stale nor often denied by this Court. This Court has been afforded few opportunities to address the question presented,

and this case provides a unique opportunity to address a circuit conflict that involves every federal court of appeals.

1. There are obvious reasons why the question presented often evades this Court's review. On the one hand, cases arising in those jurisdictions in which immediate appeals from orders denying counsel are permitted will rarely, if ever, reach this Court on the appellate jurisdiction issue. Pro se litigants in those cases are able to appeal denials, and thus have no reason to ask for this Court's intervention on that issue. And the only injury suffered by opposing parties in those cases is the interlocutory appeal on whether a pro se litigant is entitled to representation, which is an issue on which the opposing party is unlikely to seek this Court's review.

Moreover, cases arising in those jurisdictions that do not permit immediate appeals from these orders often will likewise evade this Court's review. The party aggrieved in those cases is the pro se litigant, who is unlikely to realize that the court of appeals' dismissal for lack of appellate jurisdiction is itself reviewable by this Court.

This petition is one of those few instances in which a case that squarely presents this question is before the Court. The Fourth Circuit decided the precise question presented in this petition, and a determination by this Court about whether orders denying appointment of counsel are immediately appealable will be dispositive of that issue in this case. And,

although not critical to the jurisdictional question before the Court, the underlying issues in this case—which involve the intersection between civil rights suits and federal habeas corpus—are precisely the type that would benefit from the appointment of counsel. Indeed, the Fourth Circuit thought as much when it appointed appellate counsel to review, and ultimately reverse, the district court's prior sua sponte dismissal of the case.

2. In 1987, members of this Court recognized "[t]he continued split amongst the Circuits on this issue" and thought it warranted this Court's review. *Miller v. Simmons*, 484 U.S. 903, 904 (1987) (White, J., dissenting from denial of cert., joined by Blackmun, J.). Five years later, the leading treatise on federal practice and procedure recognized that the circuits were split over this issue and observed that this Court should intervene once sufficient time had passed to gauge whether these types of interlocutory appeals burdened the judiciary. Wright & Miller, *supra*, at 114.

In the intervening span of nearly two decades, no evidence has developed that permitting these types of interlocutory appeals would result in a deluge of appeals. And decisions from those courts of appeals that permit immediate appeals demonstrate that there are instances where district courts err in refusing to appoint counsel. *See, e.g.*, *Medrano*, 99 Fed. App'x at 522; *Sanchez*, 2009 WL 3731891 at *2; *Lane*, 279 Fed. App'x at 422.

The time is now right for this Court to review this important issue.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 22, 2010

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-7318

LEE O. WILSON, JR.,

Plaintiff-Appellant,

v.

GENE JOHNSON, Director of Department of Corrections; DORIS EWING, Court and Legal Supervisor; EDWARD MEEKS, Superintendent Cold Springs Work Center,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:07-cv-00165-LMB-JFA)

Submitted: November 17, 2009
Decided: November 24, 2009

Before WILKINSON, MICHAEL, and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Lee O. Wilson, Jr., Appellant Pro Se. John Michael Parsons, Assistant Attorney General, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lee O. Wilson, Jr., seeks to appeal the district court's order denying his motion for appointment of counsel. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2006), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2006); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The order Wilson seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Lee O. Wilson,	)	
Plaintiff,	)	
	)	**1:07cv165 (LMB/JFA)**
v.	)	
	)	**(Filed Jun. 29, 2009)**
Gene Johnson, *et al.*,	)	
Defendants.	)	

ORDER

Lee O. Wilson, a Virginia inmate proceeding *pro se*, filed a civil rights action, pursuant to 42 U.S.C. § 1983, seeking monetary damages for an allegedly unconstitutional former term of imprisonment. On February 27, 2007, the action was dismissed without prejudice pursuant to *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). On July 25, 2008, that decision was reversed and remanded for further proceedings. *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008). Pursuant to the remand, defendants Gene Johnson, Doris Ewing, and Edward Meeks have returned executed waivers of service, and on June 23, 2009, the defendants jointly filed an answer to the complaint and moved for summary judgment. Now before the Court are two motions by plaintiff to appoint counsel.

A court may request an attorney to represent an indigent plaintiff proceeding *in forma pauperis*.

28 U.S.C. § 1915(e)(1). The Fourth Circuit, however, has limited the appointment of counsel to cases where "exceptional circumstances" exist, such as cases with particularly complex factual and legal issues or with a litigant who is unable to represent himself adequately. *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984). It is unnecessary at this time to appoint counsel for plaintiff. Plaintiff has made no showing that "exceptional circumstances" exist in this case which would warrant appointment of counsel. In addition, to date, plaintiff has ably filed his pleadings and replied to the various orders, as well as demonstrated comprehension of the procedures and laws of this Court and the Fourth Circuit Court of Appeals. Thus, plaintiff's Motions to Appoint Counsel must be denied.[1]

Accordingly, it is hereby

ORDERED that plaintiff's Motion to be Appointed Counsel (Docket # 24) and Motion to Appoint Counsel (Docket # 30) be and are DENIED.

The Clerk is directed to send a copy of this Order to plaintiff and to counsel for the defendants.

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[1] Plaintiff states that Professor J. E. Coleman, plaintiff's legal advisor in the appellate proceeding, told plaintiff that he "is supposed to have been appointed a mouthpiece," but for the reasons stated herein, no showing sufficient to warrant that action has been demonstrated.

Entered this 29th day of June 2009.

Alexandria, Virginia /s/ LMB
Leonie M. Brinkema
United States District Judge

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LEE O. WILSON, JR.,

Plaintiff-Appellant,

v.

GENE JOHNSON, Director of Department of Corrections; DORIS EWING, Court and Legal Supervisor; EDWARD MEEKS, Superintendent Cold Springs Work Center,

Defendants-Appellees.

No. 07-6347

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:07-cv-00165-LMB)

Argued: March 18, 2008

Decided: July 25, 2008

Before MICHAEL and GREGORY, Circuit Judges, and David R. HANSEN, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Reversed and remanded by published opinion, Judge Gregory wrote the opinion, in which Judge Michael joined. Senior Judge Hansen wrote a dissenting opinion.

OPINION

GREGORY, Circuit Judge:

The Appellant, Lee O. Wilson, Jr., ("Wilson") appeals the district court's decision to dismiss his 42 U.S.C. § 1983[1] action against the Virginia Department of Corrections. Wilson claims that he is entitled to monetary damages for unconstitutional imprisonment because Virginia improperly extended the length of his prison sentence. The district court, citing to the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), dismissed Wilson's wrongful incarceration claim *sua sponte* stating that a "§ 1983 damages claim for unconstitutional imprisonment is not appropriate unless and until plaintiff's conviction or sentence 'has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized

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[1] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.'" (J.A. 14.) This mandate is referred to as the "favorable termination" requirement.

Wilson contends that his § 1983 action is proper because success on that claim will not impugn his underlying conviction or sentence. Assuming, as we must, that Wilson's well-pleaded allegations are true, we agree that his claim is viable and as such, the district court's decision is reversed and remanded.

I.

Wilson was arrested on March 24, 2005, for grand larceny of a motor vehicle. On July 26, 2005, he pled guilty to the lesser charge of being an accessory after the fact. Consistent with Wilson's plea agreement, the Virginia state court sentenced him to twelve months imprisonment, six months of which was suspended due to time served. According to the Virginia Department of Corrections' ("VDOC") Uniform Commitment Report, Wilson's release date was April 21, 2006. (J.A. 6.) However, on March 15, 2006, the VDOC changed Wilson's release date to July 17, 2006. Wilson filed grievances with the prison administration disputing his additional imprisonment. The VDOC did not initiate any formal administrative proceedings to resolve Wilson's complaint. After

Wilson was released from prison,[2] he sued, seeking monetary damages of $105,000 for wrongful imprisonment. The district court dismissed Wilson's claim without prejudice, holding that *Heck*'s favorable termination requirement barred his § 1983 claim and stating that Wilson "may resubmit his claims to this Court in a [habeas petition]." (J.A. 15.) Wilson appeals.

II.

The VDOC contends that Wilson's § 1983 claim is not cognizable because: (1) Wilson failed to satisfy *Heck*'s favorable termination requirement prior to filing his claim, and (2) even if *Heck* did not bar Wilson's claim, because the VDOC properly calculated his sentence, Wilson's claim is moot.[3] Wilson argues

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[2] After his release, Wilson was imprisoned again on an unrelated charge. During this imprisonment, Wilson filed this § 1983 claim along with a habeas claim. In the habeas petition, Wilson argued, *inter alia*, that the VDOC improperly extended his accessory after the fact sentence. The Virginia Circuit Court dismissed Wilson's habeas petition, finding that the VDOC properly calculated Wilson's sentence. The Virginia Supreme Court affirmed the trial court's decision. The VDOC argued in a motion to stay prior to oral argument, and in a motion to dismiss after oral argument, that the Virginia Circuit Court's decision resolved the underlying factual issue in this case, thus mooting Wilson's claim. Because the issue before us is limited to the legal question of whether Wilson's § 1983 claim is cognizable, we leave the issue of whether the Virginia Circuit Court's decision moots Wilson's claim for the district court to determine on remand. As such, the VDOC's motion to dismiss is denied.

[3] *See* note 2, *supra*.

that a § 1983 action is the proper vehicle to bring his wrongful imprisonment claim because a habeas action would have been inappropriate as he does not seek release from custody. Thus, whether Wilson's § 1983 claim for wrongful imprisonment, filed after his sentence expired, is cognizable, is the sole issue before this Court. We review the district court's decision to dismiss Wilson's claim due to lack of subject matter jurisdiction, a question of law, de novo, *see e.g., Church v. Attorney General of Com. of Va.*, 125 F.3d 210, 215 n. 5 (4th Cir. 1997), taking all of his allegations "in the light most favorable to [him]." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (internal quotation marks and citation omitted).

Although the convergence of habeas and § 1983 actions has been addressed by the Supreme Court on several occasions, as the VDOC admits, it has sent "mixed signals" as to when an inmate or former inmate can pursue a § 1983 claim. (Appellee's Br. 4.) In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), a group of state prisoners filed a § 1983 action alleging that the New York State Department of Correctional Services' denial of good-time credits violated their constitutional right to due process. The prisoners sought an injunction to force the prison to restore the credits, a remedy which would have reduced the prisoners' sentences. Despite the "literal applicability" of § 1983, the Supreme Court affirmed the district court's dismissal of the claim because the prisoners' "challenge is just as close to the core of

habeas corpus as an attack on the prisoner's conviction, for it goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." *Id.* at 489. Because the plaintiffs "sought no [monetary] damages, but only equitable relief-restoration of their good-time credits," *id.* at 494, the Supreme Court expressly limited its holding to the equitable relief sought by the prisoners.

Subsequently, in *Wolff v. McDonnell,* 418 U.S. 539 (1974), an inmate filed a § 1983 class action on behalf of himself and other inmates, alleging *inter alia,* that the disciplinary proceedings at the Nebraska Penal and Correctional Complex violated their due process rights. Like the plaintiffs in *Preiser,* the prisoners complained that the prison had improperly denied them good-time credits and sought injunctive relief. The *Wolff* inmates, however, also sought damages. In holding that *Preiser* precluded injunctive relief – i.e., the restoration of good-time credits, the Supreme Court confirmed the propriety of the plaintiffs' § 1983 claim:

> habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.

Id. at 554. Thus, the Supreme Court concluded that the district court erred by not determining "the validity of the procedures employed for imposing sanctions, including loss of good . . . [because] a declaratory judgment as a predicate to a damages award would not be barred by *Preiser*." *Id.* at 554-55.

Two decades after *Wolff*, the Supreme Court, in *Heck*, considered a prisoner's § 1983 claim seeking monetary damages from the state because (1) state officers participated in an "unlawful, unreasonable, and arbitrary investigation leading to [his] arrest," (2) state officers "knowingly destroyed" exculpatory evidence, and (3) "an illegal and unlawful voice identification procedure" was relied upon at trial. *Heck*, 512 U.S. at 479 (internal quotation marks omitted). Recognizing that *Preiser* provided an "unreliable, if not an unintelligible, guide," *id.* at 482, as to whether a § 1983 claim for monetary damages is proper when it fails to challenge the "lawfulness of conviction or confinement," *id.* at 483, and concluding that *Wolff* "recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits)," *id.* at 482-483, the Court analyzed the issue as a matter of first impression. After reiterating that § 1983 claims, unlike petitions for habeas corpus, do not require administrative exhaustion, the Court held that when a plaintiff's claims challenge "the lawfulness of conviction or confinement," *id.* at 483, they are simply not "cognizable as § 1983 claims" *id.*, because:

> [w]e think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that **necessarily require** the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.

Id. at 486 (emphasis added). *Heck's* holding precludes a prisoner from a collateral attack that may result in two inconsistent results – for example, a valid criminal conviction and a valid civil judgment under § 1983 for monetary damages due to unconstitutional conviction or imprisonment.[4] Although not essential to its holding, the Supreme Court extended its analysis a step further by concluding that "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 489 n. 10.

Justice Souter's concurrence in *Heck*, joined by three Justices, recognized that the majority opinion could be interpreted to "risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes," *id.* at 500, thus preventing them from accessing a federal forum.

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[4] An additional reason for the rule is to preclude undue federal interference with states' administration of justice.

> If these individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences), like state prisoners, were required to show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment, the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason, of course, is that individuals not in custody cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.

Id. (Souter, J., concurring) (internal quotation marks omitted). Absent a statutory edict to the contrary or a restriction within the common law, the reach of § 1983 should not be compromised. Indeed, the Court has given "full effect [to the language of § 1983 by] recognizing that § 1983 provides a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Id.* at 502 (internal quotation marks and citations omitted). Thus, we "[sh]ould not cast doubt on the ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983." *Id.* at 503.

Heck and its predecessors limited our inquiry to whether a prisoner's § 1983 action, "even if successful," *id.* at 487, would compromise the validity of his underlying sentence. Four years later, however, five members of the Supreme Court found *Heck*'s "favorable termination" requirement inapplicable to a released inmate's § 1983 claim, since this was the only avenue by which he could access a federal forum. *See Spencer v. Kemna*, 523 U.S. 1 (1998). In *Spencer*, the defendant filed a federal habeas claim averring that his due process rights were violated because his parole was improperly revoked. The district court dismissed the claim as moot because the defendant was released from prison before the district court decided his habeas claim. The majority opinion, written by Justice Scalia, who also authored the Court's opinion in *Heck*, affirmed the district court's decision.

Justice Souter, joined by three other colleagues (O'Connor, Ginsburg,[5] and Breyer, JJ.), concurred with the reasoning of the majority opinion, but more importantly, articulated an additional reason for why the correct result was reached:

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[5] Justice Ginsburg, in addition to joining Justice Souter's concurrence, wrote a separate concurrence in which she stated, "I have come to agree with Justice SOUTER's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's ('broad reach.')" *Id.* at 21-22 (emphasis in original).

> Now, as then, we are forced to recognize that any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody (as, in this case, following service of a full term of imprisonment), when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.
>
> The better view, then, is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.

Id. at 20-21. Justice Stevens dissented, agreeing with the four concurring judges that "[g]iven the Court's holding that [Spencer] does not have a remedy under the habeas statute, it is perfectly clear, as Justice SOUTER explains, that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25 n. 8 (emphasis in original).

Both parties readily recognize that the circuits are split on this issue. Four circuits regard the five justice plurality in *Spencer* as dicta, and continue to interpret *Heck* as barring individuals from filing

virtually all § 1983 claims unless the favorable termination requirement is met.[6] On the other hand, five circuits have held that the *Spencer* plurality's view allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable termination requirement via a habeas action.[7]

As evidenced by the circuit split, the Supreme Court has yet to conclusively decide if a former inmate can file a § 1983 claim when his habeas avenue to federal court has been foreclosed. *See Muhammad v. Close*, 540 U.S. 749, 752 n. 2 (4th Cir. 2004) (recognizing, without deciding, that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement.") Even the four judge concurrence in *Spencer* admitted that *Heck*'s

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[6] *See e.g., Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); and *Fuchs v. Mercer County*, 260 Fed. Appx. 472, 474 (3d Cir. 2008) but cf. *Mendoza v. Meisel*, 270 Fed. Appx. 105, 107 (3d Cir. 2008) (holding that "*Heck* does not bar a § 1983 claim where the plaintiff is unable to challenge his conditions of confinement through a petition for federal habeas corpus.").

[7] *See e.g., Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *Nonette v. Small*, 316 F.3d 872, 874 (9th Cir. 2002); *Harden v. Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003); and *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007) ("We are persuaded by the logic of those circuits that have held that *Heck's* favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights.").

"favorable-termination requirement [can be interpreted as] an element of any § 1983 action alleging unconstitutional conviction, whether or not leading to confinement and whether or not any confinement continued when the § 1983 action was filed." *Spencer*, 523 U.S. at 19.

Because Wilson's § 1983 claim seeks damages for past confinement, he does not fall squarely within the holdings of *Preiser*, *Wolff*, *Heck* or *Spencer*. Thus, while Supreme Court dicta in *Heck* and *Spencer* provides grist for circuits on both sides of this dilemma, we are left with no directly applicable precedent upon which to rely. We believe that the reasoning employed by the plurality in *Spencer* must prevail in a case, like Wilson's, where an individual would be left without any access to federal court if his § 1983 claim was barred. Indeed, the reach and intent of the habeas remedy would not be circumscribed by Wilson's § 1983 claim since he filed it after the expiration of his sentence.[5] Additionally, the sweeping

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[5] While Wilson concedes that filing a petition for habeas corpus was theoretically possible, he argues that complying with habeas' administrative exhaustion requirement during the additional confinement was impossible. The plaintiffs in *Preiser* and *Wolff* admittedly could have filed habeas claims. The fact that a prisoner could have filed a habeas [sic] is an issue in which courts have taken a keen interest. For example, in *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007), the Sixth Circuit held that "a § 1983 plaintiff is entitled to a *Heck* exception if the plaintiff was precluded as a matter of law from seeking habeas redress, but not entitled to such an exception if the plaintiff could have sought and obtained

(Continued on following page)

breadth, "high purposes," and "unique[ness]" of § 1983 would be compromised in an unprincipled manner if it could not be applied here. *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (overruled on other grounds). If a prisoner could not, as a practical matter, seek habeas relief, and after release, was prevented from filing a § 1983 claim, § 1983's purpose of providing litigants with "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nations," *id.* at 271-272 (internal quotation marks and citation omitted), would be severely imperiled. Barring Wilson's claim would leave him without access to any judicial forum in which to seek relief for his alleged wrongful imprisonment. Quite simply, we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right – freedom – should be left without access to a federal court.

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habeas review while still in prison but failed to do so." *Id.* at 601 (internal quotation marks and citation omitted). In *Powers*, the defendant only spent one day in jail, thus precluding him from filing a habeas petition as a practical matter. In *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999), the Second Circuit held that *Heck* did not bar an individual's § 1983 claim alleging selective prosecution because his criminal sentence only involved paying a monetary fine.

III.

For the foregoing reasons, we reverse the judgment of the district court and remand it for further proceedings consistent with this opinion.

REVERSED AND REMANDED

HANSEN, Senior Circuit Judge, dissenting:

The *Heck*[1] favorable termination requirement is more than *dicta* that we, as an inferior court, can choose to ignore. Despite the views of the then-five sitting justices (now reduced to four on the current Court) expressed in *Spencer*,[2] the Supreme Court has not made any exceptions to the favorable termination requirement, and we are bound to enforce the requirement where it applies. Because Wilson's § 1983 claim "necessarily require[s] [Wilson] to prove the unlawfulness of his . . . confinement," *Heck*, 512 U.S. at 486, I would affirm the district court's dismissal. I therefore respectfully dissent.

This court's opinion properly articulates *Heck*'s holding that claims challenging the lawfulness of a

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[1] *Heck v. Humphrey*, 512 U.S. 477 (1994).

[2] *Spencer v. Kemna*, 523 U.S. 1 (1998). Notably, this court's opinion elevates these views to that of a "plurality," (*supra* at 9), even though the Supreme Court itself has recognized them for what they are – the views of five justices in *Spencer* articulated in concurrences and a dissent, *see Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004).

defendant's conviction or his confinement are simply not cognizable under § 1983, and that the holding applies to "'§ 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement.'" (*See supra* at 6, quoting *Heck*, 512 U.S. at 486 (emphasis omitted)). As articulated by the Supreme Court, that holding is unqualified. *See*, 512 U.S. 477 (1994). *Heck*, 512 U.S. at 486-87 ("We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [overturned]."') (footnote omitted). Rather than apply *Heck*'s holding to Wilson's § 1983 claim, this court's opinion then goes into a discussion of the views of five of the then-sitting justices espoused in *Spencer* about the effect of *Heck* on claimants who lack a justiciable habeas claim. *Spencer* involved the issue of whether a habeas claim became moot when the claimant was released from prison during the pendency of the habeas claim. *Spencer*, 523 U.S. at 3. Spencer had not filed a § 1983 claim. The only relevance § 1983 had to the *Spencer* case was Spencer's argument that his habeas claim should not be moot because *Heck* would preclude a later § 1983 claim, leaving him with no recourse. The majority opinion, which was joined in full by the concurring opinions, rejected that argument, calling it "a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.* at 17. The

discussion in Justice Souter's concurrence is nothing more than an expression of his views about whether the habeas claimant ought to be able to bring a § 1983 claim after his habeas claim became moot, an issue not then before the Court.

Our panel's opinion in this case then determines, without elaboration, that this case is not directly controlled by *Heck* "[b]ecause Wilson's claim seeks damages for past confinement." (*See supra* at 9.) That factual distinction notwithstanding, *Heck*'s holding, as well as its reasoning, clearly covers Wilson's § 1983 claim. In rejecting Justice Souter's suggestion that a § 1983 claim might lie where the claimant has no available habeas remedy, Justice Scalia, writing for the majority in *Heck*, reinforced the purpose behind its holding by stating that "the principle barring collateral attacks – a longstanding and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck*, 512 U.S. at 490 n.10. In my view, although *Heck* did not involve a claim based on past confinement, this statement is part of the core holding of *Heck* by which we are bound. *See Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) ("Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck* [referring to the statement in footnote 10], however, we decline to depart from that rule."), *cert. denied*, 128 S. Ct. 1714 (2008); *Figueroa v. Rivera*, 147 F.3d 77, 81 & n.3 (1st Cir. 1998) (describing *Heck*'s "core holding" as

requiring the "annulment of the underlying conviction" before a § 1983 claim could be brought in a case where habeas was unavailable due to the inmate's death). The importance of avoiding inconsistent results between a criminal conviction and sentence on the one hand and a civil constitutional tort action on the other is not lessened just because the defendant/claimant is no longer incarcerated.

The Supreme Court has reinforced the continuing validity of the *Heck* favorable termination requirement since *Spencer*. In explaining the intersection between habeas claims and § 1983 claims, the Supreme Court stated that "[s]ome cases are hybrids, with a prisoner seeking relief unavailable in habeas, notably damages, but on allegations that not only support a claim for recompense, but imply the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement." *Muhammad*, 540 U.S. at 750-51. In those hybrid situations, a defendant must still establish favorable termination of his underlying conviction or sentence before being allowed to bring a § 1983 claim seeking damages for the alleged deprivation of his constitutional rights. *Id.* at 751. This case fits squarely within the favorable termination requirement as expressly articulated by the Supreme Court thus far.

Even if the *views* of the members of the Supreme Court have changed, we are bound to follow the holdings of the Supreme Court until the Court *holds* differently. *See Agostini v. Felton*, 521 U.S. 203, 237

(1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (internal marks omitted)); *Mackall v. Angelone*, 131 F.3d 442, 445-49 (4th Cir. 1997) (en banc) (applying the rule from *Agostini* and following *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), even though the case at hand was factually distinguishable from *Finley* and the Supreme Court had noted, but not ruled on, the same factual distinction in *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)), *cert. denied*, 522 U.S. 1100 (1998). That Justice Ginsburg changed her mind between *Heck* and *Spencer* does not change the fact that we, as an inferior court, must continue to follow the holdings of the Supreme Court, not the views as espoused by the varying justices on issues not before the Court. *See United States v. Chase*, 466 F.3d 310, 315-16 (4th Cir. 2006) ("[Although] the overruling of *Almendarez-Torres* may be imminent, *see Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in the judgment) ('*Almendarez Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.'), . . . until such overruling occurs, we must follow the decision when it controls." (citing *Agostini*)). We hold no charter to carve exceptions out of Supreme Court stone even if the winds of changing views have eroded

it. Judicial restraint, as well as respect for precedent and our place within the hierarchy of the federal judiciary, counsel that we must continue to apply the *Heck* favorable termination requirement where applicable, and without exception, until the Supreme Court tells us otherwise.

I respectfully dissent.